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in the
Supreme Court
of the
United States

October Term 1988

ROBERTO VALERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

LAW OFFICES OF LOUIS VERNELL
160 Sunny Isles Boulevard
North Miami Beach, Florida 33160
(305) 949-6151 and

LAW OFFICES OF JUDITH MIZNER
79 State Street, 2nd Floor
Newburyport, MA 01950
(508) 462-0505

Attorneys for Petitioner
Roberto Valera

QUESTIONS PRESENTED

1. Whether a RICO enterprise alleged to consist of a group of persons associated in fact for the purpose of conducting illegal activity must have an ascertainable structure different from that inherent in the pattern of racketeering activity also required to establish a RICO offense, and whether the RICO enterprise alleged here -- a number of discrete drug smuggling ventures between 1977 and 1983 conducted by various groups of individuals -- possessed such an ascertainable structure?

2. Whether the government adequately proved the single RICO enterprise and the single RICO conspiracy charged where the evidence at trial established a number of discrete, self-contained drug smuggling ventures between 1977 and 1983 conducted by various groups of individuals; there was no evidence that petitioner participated in or was even aware of the majority of those ventures or that he knew a number of the persons involved in those ventures; and there was no basis for finding or inferring that the participation of others beyond the group involved in a particular venture was necessary for its success?

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---

Roberto Valera petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on May 20, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, affirming petitioner's conviction for violations of 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1952, is reported at 845 F.2d 923 (11th Cir. 1988).

JURISDICTION

The opinion of the Court of Appeals was issued on May 20, 1988 (A-1 to A-16). Judgment was entered on May 20, 1988 (A-17). A timely petition for rehearing was denied on August 30, 1988 (A-18 to A-19). This Court granted an enlargement of time to November 28, 1988 for filing this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. sections 1961 et seq. provide, in pertinent part:

18 U.S.C. § 1961(4):

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;"

18 U.S.C. § 1961(5):

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any

period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d):

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), (c) of this section.

STATEMENT OF THE CASE

On May 6, 1986 a multi-count indictment charging petitioner and seven others with, *inter alia*, conducting the affairs of an enterprise through a pattern of racketeering activity and conspiracy to do so (in violation of the RICO statute, 18 U.S.C. § 1962(c) and (d), was returned in the Middle District of Florida (A-20 to A-60). The enterprise was alleged to consist of "a group of individuals associated in fact, made up of the defendants and others, which engaged in and the activities of which affected interstate commerce." (A-23). The pattern of racketeering activity allegedly involved the importation, receiving, concealment, buying, selling and otherwise dealing in narcotic and dangerous drugs (A-23). Peti-

tioner was also charged with three counts of traveling in interstate or foreign commerce to facilitate the commission of a drug offense (A). After trial before a jury, petitioner was convicted of the RICO offenses and two of the three interstate travel offenses. He was found not guilty of the third.

The indictment alleged that the RICO offenses occurred between June 1979 and April 11, 1983 (A-22). While the indictment charged a single enterprise and a single conspiracy consisting of the eight named defendants and others and otherwise described 28 acts of alleged racketeering activity and 32 additional overt acts in furtherance of the conspiracy (A23 to A-50), there are no factual allegations in the indictment that petitioner had any contact with, or even knew of the existence of at least four of his named codefendants. Nor was there any evidence of such contact or knowledge at trial.[2]

The racketeering acts alleged in the indictment describe four marijuana transactions and a conspiracy to import cocaine in which petitioner was not alleged to be involved. Moreover, there was no evidence at trial that petitioner had any knowledge of these transactions or of two of the three named individuals who were allegedly involved in those ventures. The racketeering acts described in the indictment additionally includ-

[1]While the indictment charged eight persons with various offenses, petitioner was tried alone.

[2]Indeed, there was no evidence at trial that petitioner had any contact with or knowledge of a fifth named defendant who was allegedly involved with petitioner in a cocaine importation in March 1981. Rather, a governmental key witness testified that petitioner had nothing to do with that person. (Crawford 91).

ed four cocaine transactions in which there was likewise no allegation of any involvement on the part of Petitioner, but instead charged other groups of persons who similarly had no alleged connections to petitioner. Moreover, there was no evidence at trial that petitioner had any knowledge of these ventures or of persons allegedly involved therein. Finally, the racketeering acts described yet four more cocaine transactions in which no involvement on the part of petitioner was alleged. While these acts were committed by persons allegedly known to petitioner, there is no allegation that Petitioner knew or participated in such transactions, nor was any evidence of such knowledge or participation adduced at trial.

Despite the seeming countless acts and offenses committed by other individuals, Petitioner's alleged involvement was limited to a cocaine importation in March 1982; a hashish importation in October-November 1981 and causing travel to Belize and Gambia in October and December 1982 to facilitate drug transactions. These allegations involved three other named defendants.

The gravamen of the government's case at trial was presented through the testimony of three cooperating witnesses[3] who described a number of different drug smuggling ventures conducted by different groups operating at different times between 1977 and 1983. One of such witnesses—a pilot who participated in a number

[3]Two of those witnesses were charged in the same indictment and had previously pled guilty to various charges; the third had been charged in and pled guilty to a separate indictment.

of smuggling ventures—testified that there was no single group working on joint or continuing projects to smuggle drugs into the United States; rather, there were a number of unconnected groups each of which operated independently and were unaware of the others' existence (A-61 to A-64). Only one of the defendants named in the indictment was alleged to have been involved in all of the different groups.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE STANDARDS FOR DETERMINING THE NATURE AND SCOPE OF A RICO ENTERPRISE CONSISTING OF A GROUP OF INDIVIDUALS ASSOCIATED IN FACT SHOULD BE CLARIFIED BY THIS COURT TO RESOLVE A CONFLICT AMONG THE CIRCUITS

The court below found that "[w]hile there were many ventures or individual conspiracies, there was also one enterprise, one common purpose, and one overarching Conspiracy." (A-11). However, in so holding, the court failed to properly apply the essential elements of a RICO enterprise in its consideration of either the indictment or the evidence introduced at trial, viz.:

As noted, while the evidence demonstrated numerous drug smuggling ventures conducted by various and divers groups of individuals, it totally failed

to establish that these varied ventures[4] were part of a single enterprise within the meaning of the RICO statute or of a single, overarching RICO conspiracy. Indeed, key governmental testimony unequivocably demonstrated that there were a number of unconnected groups, unaware of each others' existence, which had independently committed the acts charged.

Albeit, in order to establish the substantive violation of the RICO statute as proscribed by 18 U.S.C. § 1962(c), the government must prove both the existence of an enterprise (defined in 18 U.S.C. § 1961(4)) and that a person employed by or associated with an enterprise conducted or participated in the conduct of the affairs of that enterprise through a pattern of racketeering activity (defined in 18 U.S.C. § 1961(5)).

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that an enterprise could consist of a group of people, associated in fact, for the purpose of conducting illegal activity. As noted, the indictment in the case sub judice followed such pronouncement and charged that the indicted defendants and others allegedly constituted a single RICO enterprise consisting of a group of individuals associated in fact for the purpose of engaging in drug transactions.

---

[4]The ventures involved the importation of marijuana from Colombia to Florida by plane; the importation of cocaine from Colombia to Florida by plane; the importation of cocaine from Colombia to North Carolina by plane; the importation of cocaine from Colombia to Georgia by plane; the importation of hashish from the Middle East to Delaware by boat; and conspiracy to import hashish from the Middle East, through Senegal and Belize to the United States by plane.

In *Turkette*, however, this Court at 583 also held that where an enterprise consists of such group of persons, they must also be "associated together for a common purpose of engaging in a course of conduct" and that such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." Moreover, this Court further held that "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages."

While various Courts of Appeals have recognized these principles generally, the nature of the distinction between the enterprise and the pattern of racketeering activity and the proof necessary to establish that distinction has not been clearly defined. Whether a RICO enterprise must have an ascertainable structure distinct from that inherent in the pattern of racketeering activity, and how that structure is to be established, is an issue that has split the circuits. Compare, *United States v. Riccobene*, 709 F.2d 214, 223-24 (3rd Cir.), *cert. denied*, 464 U.S. 849 (1983); *United States v Bledsoe*, 674 F.2d 647, 665 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982); and United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985) (separate existence necessary); with *United States v. Bagaric*, 706 F.2d 42,55 (2nd Cir.) *cert. denied*, 464 U.S. 840 (1983); *United States v. Weinstein*, 762 F.2d 1522, 1537 n.13 (11th Cir.), *modified*, 778 F.2d 673 (1985), *cert. denied*, 475 U.S. 1110 (1986) (separate existence not necesary).

Petitioner submits that the requirement that an organization have a distinct ascertainable structure dif-

ferent from that inherent in the pattern of racketeering activity is essential to ensure that criminal enterprises are distinguished from individuals who associate for the commission of sporadic crime. As the Eighth Circuit Court of Appeal stated in *United States v. Bledsoe, supra*, 674 F.2d at 659, RICO "was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes." Yet, unless the government is required to establish an organization with a structure independent from that of the pattern of racketeering activity, it will be permitted, in practice and effect, to expand the parameters of the RICO statute far beyond its intended scope.

Although the Court in *Bledsoe, supra*, underscored the critical importance of establishing an ascertainable structure before a RICO conviction could lie, the Court below failed to provide even "lip service" to such sina qua non requirements.

Bledsoe, at 664:

> The word "enterprise" ordinarily means an undertaking or project or a unit of organization established to perform any such undertaking or project. However, under Rico, an enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association

apart from the commission of the crime itself. *Thus unless the inclusion of the enterprise element requires proof of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering, the Act simply punishes the commission of two of the specified crimes within a 10-year period. Congress clearly did not intend such an application of the Act.*

The *Bledsoe* court reasoned:

Because RICO does not require proof of a single agreement as in a conspiracy case, it creates a danger of guilt by association. *See United States v. Griffin*, 660 F.2d 996, 1000 14th Cir. 1981). The Individuality of guilt is assured by requiring proof that the enterprise with which individuals associated had certain distinct characteristics. As the Fourth Circuit wrote in *Griffin:*

> *Proof of the existence of an associated-in-fact enterprise requires proof of a "common purpose" animating its associates, and this may be done by evidence of an ongoing organization, formal or informal," of those associates in which they function as a 'continuing unit.' [Turkette,]* 452 U.S. at 538, 101 S.Ct. at 2528. The ties between the individual associates that are implied by these concepts *of continuity, unity, shared purpose* and *identifiable structure* operate precisely to guard against the danger that guilt will be adjudged solely by virtue of associations not so related. They define the

> line between "concerted action" through "group association for criminal purpose," for which "combination in crime" may constitutionally be proscribed, *Callanan v. United States*, 364 U.S. 587, 593-94 [81 S.Ct. 321, 325, 5 L.Ed.2d 312] (1961) and less clearly related conduct that may not be so proscribed and prosecuted. 660 F.2d at 1000. *Id.* at 664.

Clearly, the lower court failed to properly apply such principles or to otherwise adhere to the "fundamental" requirements enumerated by this Court in *Turkette* "that the enterprise function as a continuing unit" (at 665).

Here, and except for isolated, discrete and sporadic activities conducted by divers groups, the record demonstrates the total absence of any continuity of structure and personality as required in *Bledsoe*,

> What is essential, however, is that there is some continuity of both structure and personality. For example, the operatives in a prostitution ring may change through time, but the various roles which the old and new individuals perform remain the same. But if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before. *Id.* at 665.

Despite the compelling arguments and soundness of principles as enumerated in *Bledsoe* there is, notwithstanding, irreconcilable conflict and disparity of opinion presently existing between the circuits. Indeed, and as to the precise issues presented herein, the

positions of both the Fourth and Eighth Circuit Courts of Appeals appear to be in direct conflict with that enunciated by the Eleventh Circuit in the case sub judice.

Indeed, the gravity of the existing conflict is underscored in *U.S. v. Weinstein, supra*, where in a somewhat obscure footnote, the Eleventh Circuit vigorously denounced not only the pronouncements made by the *Bledsoe* court, but the *Turkette* holdings of this court as well, viz.

> The appellants in *Hewes* argued that the Eighth Circuit's holding in *United States v. Bledsoe*, 674 F.2d 647, 665 (8th Cir.) *cert. denled*, 459 U.S. 1040, 103 S.Ct. 456, 74 L.Ed.2d 608 (1982), (a RICO enterprise must possess an "ascertainable structure" distinct from the associations necessary to conduct the pattern of racketeering activity) stated a correct definition of RICO enterprise under federal law. *Our cases have repeatedly rejected this contention and we reiterate that rejection here.* Moreover, in *Hewes* we also rejected the contention that *Turkette's* reference to the RICO enterprise as a "continuing unit" required participation of all members throughout the life of the enterprise. This, too, is not the law of this circuit. *Hewes*, 729 F.2d at 1311.

Ergo, if as Petitioner contends, an ascertainable structure is, in fact, required to prove a RICO enterprise, this Court should appropriately establish and provide standards and guidance to the lower courts in defining the nature and scope of such requirement(s). Where the RICO enterprise is alleged to consist of different groups

of persons committing different offenses at different times, petitioner submits that factors such as the shared use of resources among groups, the sharing of profits among groups, the continuous maintenance of resources in readiness for the commission of offenses outside the time frame of actual offenses, and the existence of other activities undertaken by the alleged enterprise are elements which should necessarily be examined and scrutinized by the Courts.

In this case, however, the government failed to establish such a distinction between the enterprise and the pattern of racketeering activity. To the contrary, the evidence demonstrated that varying groups of people came together at various times for purposes of engaging in discrete drug transactions or groups of transactions. There was absolutely no showing of a "structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering . . ." *Id.*, at 664. For example, there was no evidence that the enterprise purchased assets jointly used by the different groups involved in the numerous drug transactions described or held in readiness for use during the intervals between the the commission of the various drug transactions. Nor was there evidence of profit sharing, common disbursements or expenditures, money laundering, etc. which was jointly used or shared in by the different groups.

Finally, the trial court's instructions failed to provide the jury with a proper standard for determining the existence of an enterprise. The trial court first provided the statutory definitions of enterprise and pattern of racketeering activity. The court then instructed that the jury had to find that "the defendant was associated with '*an* enterprise' as defined in these instructions dur-

ing the time of the alleged racketeering action as alleged in the indictment";[5] that the defendant committed two predicate offenses; that those predicate offenses were connected so as to be a pattern of criminal activity; that "through the commission of the two or more connected offenses, the defendant conducted or participated in the conduction of the enterprise affairs"; and that the enterprise was engaged in or that the activities affected interstate commerce (A-64 to A-65). Nowhere, was the jury instructed that proof of the enterprise required something more than mere association to commit the predicate acts.

Accordingly, petitioner submits that this Court should grant certiorari to resolve the split of authority in the Circuits and to provide the lower courts with needed guidance concerning the proper definition and nature of a RICO enterprise.

B. THE COURT BELOW ERRED IN FINDING A SINGLE RICO ENTERPRISE AND A SINGLE RICO CONSPIRACY UPON EVIDENCE OF DISPARATE, THOUGH SIMILAR, ACTIVITIES BY DISPARATE GROUPS; THIS COURT SHOULD REAFFIRM THE VITALITY OF KOTTEAKOS V. UNITED STATES AND REVERSE PETITIONER'S CONVICTIONS

[5]Thus, it is not even clear that the jury had to find the particular enterprise alleged in the indictment—as opposed to something else it may have determined met the overall statutory definition read by the trial court.

While the court below found that "there were many ventures or individual conspiracies," it also concluded, without appropriate basis in the record, that "there was also one enterprise, one common purpose, and one overarching conspiracy." (A-11). Petitioner submits that the lower court's conclusions in this regard are without support either in fact or in law. Rather, the evidence presented in this case demonstrates that the government failed to establish either the single RICO enterprise alleged in the indicment (if, indeed, it established any RICO enterprise at all) or the single RICO conspriacy alleged in the indictment, and that the failure to do so constitutes a material variance under *Kotteakos v. United States*, 328 U.S. 750 (1946) and its numerous progeny.[8] At best, the government's evidence established multiple enterprises and multiple conspiracies.

1. *Enterprise*

Proof of a single enterprise requires, at minimum, proof of a common or shared purpose, an ongoing organization and associates functioning as a continuing unit. *United States v. Turkette*, *supra*. Separate schemes, even though operated with the same modus operandi and sharing some overlap in participants do not establish a single enterprise. See, e.g., *United States v. Bledsoe*, *supra*.

[8]Indeed, in its closing argument the government sought to redefine the enterprise as a group of persons consisting simply of its three cooperating witnesses, rather than the defendants and others as charged in the indictment. Nor did the trial court correct this erroneous redefinition in its charge.

Petitioner concedes that there are a limited number of methods of importing controlled substances. Yet, evidence that different groups engage in such activities, even groups with some overlapping participants, cannot suffice to transform their multiple schemes into a single enterprise. Albeit, a number of separate schemes is all that the government established in the case at bar. Clearly, it proved no single hierachy or an inner circle directing a single, overarching organization in which different groups served different roles, such as financiers, importers, distributors, etc.—thereby rendering the particpation of a number of groups essential to the success of an overall operation. Rather, each smuggling group described by the witnesses was self contained; and had its own financial and operational personnel so that the participation of other groups was not necessary to the success of a particular operation. Nor was there evidence of a sharing of resources, facilities or profits among the disparate groups described at trial. Accordingly, the court below erred in finding a single RICO enterprise.

2. *Conspiracy*

A RICO conspriracy requires, at minimum, proof of an agreement to conduct or participate in the affairs of a RICO enterprise through a pattern of racketeering activity. *United States v. Neapolitan*, 791 F.2d 489, 498(7th Cir. 1986); *United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. 1981). Neither proof of an agreement to commit the predicate acts necessary to establish a pattern of racketeering activity, nor proof of association with an enterprise is sufficient to establish a single RICO conspiracy. Since it is the agreement to participate in the affairs of the enterprise charged that is the essence of a RICO conspiracy, to be held liable as a RICO

conspirator, a defendant must have understood the scope of the enterprise whose affairs he is charged with having agreed to further.

The fact that separate conspiracies may share a similar objective or a common conspirator does not transform those separate conspiracies into a single conspiracy. See, e.g., *United States v. Sutherland*, *supra*; *Kotteakos v. United States*, *supra*; *United States v. Cambindo Valencia*, 609 F.2d 603 (2nd Cir. 1979).

In this case, the government's evidence established, at most, separate conspiracies to engage in drug transactions. There was no evidence that petitioner participated or agreed to participate in any of the transactions conducted by other groups. There was no evidence that petitioner understood, or had reason to believe that any of his actions would render him a participant in the single enterprise conspiracy alleged in the indictment. Rather, as described by the government's witnesses at trial each of the many groups engaging in drug transactions were independent and self sufficient. Nor was there any reason for members of one smuggling operation to believe that a larger group was necessary for the success of their operation. This was not a situation in which one group was involved simply in importation and, therefore, reasonably had to know that additional personnel—financiers and distributors—would be required if their scheme was to succeed.

3. *Prejudicial Impact*

Here, as in *Kotteakos*, *supra*, the variances between the offenses alleged and the offenses proved affected peti-

tioner's substantive rights—his right "not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others." 328 U.S. at 775.[7] The "dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise..." (*id.*, at 774), cannot be ignored in this case, given the numbers of offenses by others presented at trial, the consequent prejudice is plain.

Accordingly, certiorari should be granted to correct the erroneous decision below; to define the proper scope of a RICO enterprise and a RICO conspiracy; and to otherwise reaffirm the principles of *Kotteakos v. United States*, 328 U.S. 750 (1956).

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[7]While petitioner was tried separately, the same principle applies All of the evidence of the alleged crimes committed by others was introduced against him since, as a matter of general conspiracy law, a conspirator is responsible for the acts of his conspirators.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF JUDITH MIZNER
79 State Street, 2nd Floor
Newburyport, MA 01950
(508) 462-0505

and

LAW OFFICES OF LOUIS VERNELL
160 Sunny Isles Boulevard
North Miami Beach, Florida 33160
(305) 949-6151

Attorneys for Petitioner
Roberto Valera

By _____

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305) 949-6151 and

LAW OFFICES OF JUDITH MIZNER
79 State Street, 2nd Floor
Newburyport, MA 01950
(508) 462-0505

Attorneys for Petitioner
Roberto Valera

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No. 87-3380

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ROBERTO VALERA,
Defendant-Appellant

Appeal from the United States District Court for the Middle Distict of Florida

Before HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Judge.

*Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

EDMONDSON, Circuit Judge:

Defendant Roberto Valera appeals his convictions and sentences for substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. secs. 1962(c) and (d), and for violations of the Travel Act, 18 U.S.C. secs. 1952 and 2, all deriving from drug smuggling operations. Valera alleges divers errors, including a) *Brady*, *Giglio*, and *Jencks* error stemming from government failure to disclose certain documents; b) an impermissible variance between the indictment's charge of a single RICO offense and a single RICO conspiracy and evidence at trial of multiple offenses and multiple conspiracies; and c) error that allowed one defense witness to claim fifth amendment privilege.[1] Because none of these claims warrants a reversal of the convictions, we affirm.

Evidence showed that appellant Valera met Scott McKenney, then a U.S. Customs patrol officer, in February 1981. For several years McKenney had been using his knowledge of custom procedures to facilitate the transport and importation of drugs into the United States. Valera asked McKenney to arrange the importation of a shipment of cocaine from Valera's source in Colombia. McKenney knew several people that he called upon from time to time to help in importations. For Valera's venture, McKenney obtained the services of Joseph Crawford as pilot, of Danny Martin, as communications expert, and of John Feller, who adapted the fuel system of the aircraft to be used. In March 1981 Crawford brought in sixty-five kilograms of cocaine from Colombia for Valera.

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[1]We have examined appellant's other claims. They are without merit and will not be discussed.

In meetings with McKenney, Crawford and Martin throughout the spring and summer of 1981, Valera discussed plans to bring a freighter carrying hashish to a port in Delaware and other plans to bring hashish from the Middle East into the United States, via Belize, using a large jet for the transatlantic journey and smaller aircraft for the final leg of the importation. In fall of 1981, Valera paid Martin to set up communications in Delaware regarding the freighter venture and also had Crawford fly a plane from Florida to Delaware in connection with that same venture.

Related to the Middle East plan, Valera had Martin and Crawford travel to Belize in fall of 1982. There Martin set up radar and communications at a clandestine airstrip. Martin and Crawford investigated the feasibility of landing a large aircraft on a nearby remote road, and upon their return, reported to Valera that the road was too small to accommodate a large jet.

In October 1982 Valera sent Martin to Senegal to look into the possibility of setting up communications equipment. Valera also used Martin's services on several subsequent occasions. After 1982 Valera had no further involvement with McKenney, Crawford, and Martin.

An indictment in the case came down in May 1986, charging the existence of a RICO association in fact from June 1979 to April 1983. Valera was named in four of the racketeering acts of the substantive RICO count and in five of the overt acts of the RICO conspiracy charged in count two; he was also charged with three violations of the Travel Act, for encouraging interstate and foreign travel in aid of racketeering. After a one-week trial at

which he was the sole defendant, Valera was convicted of both RICO offenses and of two Travel Act offenses. The defendant was sentenced to a total of thirty years in prison and was fined a total of $50,000.

I. *Brady, Giglio* and *Jencks Claims*

[1,2] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), requires that the government disclose to the defense evidence exculpatory to the defendant. *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), requires government disclosure to the defense of promises of leniency or immunity made to government witnesses; that one prosecuting attorney may be unaware of certain promises made by another does not affect the government's responsibility. The Jencks Act, 18 U.S.C. sec. 3500, requires that after a government witness has testified on direct examination, the government disclose to the defense verbatim statements made or adopted by that witness which relate to the subject matter to which the witness has testified.

Defendant Valera alleges *Brady, Giglio* and *Jencks* errors as to a variety of statements and evidence. Primarily, he claims that the government acted improperly in not disclosing material that would have impeached witness McKenney: a) a memorandum prepared by Assistant U.S. Attorney Sullivan after McKenney had falsely stated to the U.S. Attorney that one Ronald Hansen, just arrested for drug smuggling, had actually been working as an undercover agent for McKenney (the Sullivan memorandum); b) the documents in McKenney's personnel file relating to the

internal affairs investigation of McKenney, including a statement by McKenney to Agent Allen, who conducted the investigation, and notes that McKenney had made about the Hansen affair; c) McKenney's statements to Customs Agent Rivera who interviewed McKenney after McKenney's arrest (Rivera documents).

[3] Under the Jencks Act only prior verbatim statements made or adopted by a witness and relating to his testimony need be disclosed to the defense. *See* 18 U.S.C. sec. 3500(e)(1) and (2); *United States v. Ricks*, 817 F.2d 692, 698 (11th Cir.1987); *United States v. Gaston*, 608 F.2d 607, 611 (5th Cir.1979). The Sullivan memorandum is just a report written by U.S. Attorney Sullivan and never adopted by McKenney; the Rivera documents are not verbatim statements, but summaries written by Agent Rivera of what McKenney had told him. The district court did review both documents and correctly determined that the Sullivan memorandum and the Rivera documents did not fall within the Jencks definition of "statement" because neither of them was a verbatim transcription of what McKenney had stated in his conversations with Sullivan and Rivera and McKenney had adopted neither of the statements.

[4] The district court did, however, order disclosure of the notes McKenney had made on the Hansen affair and of McKenney's affidavit given to Agent Allen, because both of these documents fell within the ambit of the Jencks Act (both meeting the Act's definition as to verbatim statements). Because the government first uncovered these documents in the internal affairs file on the third day of the trial, after witness McKenney had concluded his testimony, the court permitted

McKenney to be recalled for cross-examination about these verbatim documents. The district court thereby obviated any prejudice to the defense resulting from tardy disclosure of the verbatim documents. Consequently, there was no Jencks Act violation.

[5] The mandate of *Brady* and *Giglio* are broader; under these principles, defendant Valera also claimed access to the Sullivan memorandum, McKenney's internal affairs investigation file, and the Rivera summaries.[2] The district court personally reviewed the Sullivan memorandum and the Rivera summaries and determined that their contents did not mandate their release to the defense under *Brady*. In light of the government's assertions, after the government's review of the internal affairs investigation files on McKenney, that there was no *Brady* material in these files, the district court also determined that disclosure was unnecessary. Appellant Valera now claims that the district court erred in its ruling and by not examining McKenney's internal investigation files *in camera* to determine for itself whether or not the files contained disclosable material. Valera claims that *in camera* review was clearly indicated because the government disclosed McKenney's statement and notes in the internal affairs file only after

[2]While Valera states that he is asserting *Giglio* error, his arguments as to the documents in question go explicitly to *Brady* error. Valera apparently cites *Giglio*, not so much for the principle that these documents relating to McKenney contain material on government leniency toward McKenney, but rather for the idea that the government cannot excuse any oversight or delay in disclosure due to the fact that the prosecuting attorney at trial entered the case shortly before the trial date. We therefore will direct our own discussion primarily to matters that relate substantively to *Brady*, although we of course remain mindful of the dictates of *Giglio* in our review.

the government had initially claimed that the file contained no disclosable material.

[6] Occasionally, it is appropriate for judges to examine personally government files to satisfy *Brady*, *Giglio*, or the Jencks Act. *See United States v. Griggs*, 713 F.2d 672 (11th Cir.1983) (rejecting idea that, unless the prosecution has doubts as to the non-existence of *Brady* material, a district judge has no power to conduct an *in camera* inspection). Generally, however, trial judges are not required to examine personally government files. *Gaston*, 608 F.2d at 612. How the trial court proceeds to enforce disclosure requirements is largely a matter of discretion to be exercised in light of the facts of each case.

In this case the district court based its ruling and its refusal to review the internal affairs file not only on a simple assurance from the government as to the absence of *Brady* material in the file. In addition, the district court, outside the presence of the jury, heard testimony of defense witnesses Sullivan, Allen (who had conducted the internal affairs investigation of McKenney), and Rivera. After this hearing and based on the testimony of Allen who examined the internal affairs file while on the witness stand and determined that it contained no further disclosable material, the district court concluded that no *in camera* review by the court was necessary.

Under these circumstances, we cannot say that the district court acted incorrectly. Even had the district court improperly denied defense access to one or more of these documents, we suspect that the denial would have constituted only harmless error in this case for either of two reasons.

[7] First, "[t]he purpose of *Brady* is to assure that the accused will not be denied access to exculpatory evidence known to the government but unknown to him .... [T]here is no *Brady* violation when the accused or his counsel knows before trial about the allegedly exculpatory information and makes no effort to obtain its production." *United States v. Cravero*, 545 F.2d 406, 420 (5th Cir.1976) *cert. denied*, 430VS983, 97 S.CT. 1679, 52 L.Ed.2d 377 (1977); *see also United States v. Prior*, 546 F.2d 1254, 1259 (5th Cir.1977) ("[N]umerous cases have ruled that the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself."). The defense here had interviewed Assistant U.S. Attorney Sullivan concerning McKenney's statements about Hansen and had obtained files of the Rivera investigation from discovery in the pending trial in another case. Because the defense was already in possession of the information presented in the Sullivan memorandum and in the Rivera documents, government failure to produce these documents cannot constitute *Brady* error.

[8-10] Second, Valera's claims of *Brady*, *Giglio*, and Jencks Act violations go chiefly to material that the defense wished to impeach witness McKenney. McKenney had already entered a guilty plea to bribery and racketeering. At Valera's trial, McKenney testified that he had intervened in the Hansen affair, falsely claiming that Hansen was an informant. This guilty plea and McKenney's own admissions provided the defense information and evidence by which it could and did impeach witness McKenney. Cross-examination of McKenney by the defense illustrated how and why McKenney was disposed to cooperate with the government. The files and

documents requested would have only been cumulative on these points. Because the defense has not shown how the requested documents were material to the impeachment of McKenney, and not merely cumulative, any error in failure to produce them is harmless. *See United States v. Dekle*, 768 F.2d 1257, 1263 (11th Cir.1985); *United States v. Barshov*, 733 F.2d 842, 849 (11th Cir.1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985).[3]

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[3]On appeal, Valera also contests the government's failure to disclose to the defense according to Fed.R.Crim.P. 16(c) certain airplane sale receipts and witness Martin's passport. The government argued to the trial court that the defendant Valera was not made aware of these receipts during discovery because the documents first came into the government's possession on the eve of their use at trial and that Martin's passport could not be disclosed because it was not in the prosecution's possession, but in a sealed vault in the court's safekeeping.

In respect to these alleged discovery violations, appellant seemingly forgets 1) that his initial objection to the government's use of these airline receipts was withdrawn, so that Valera cannot now resurrect the argument on appeal; 2) that the district court, in any event, sustained the defense's objection to the receipts and the passport, refused to allow the government to admit them as evidence, and allowed the witnesses only to refresh their recollections by looking at these documents (McKenney, to refresh his memory as to the dates of his initial dealings with Valera; Martin, as to dates of his travels to Africa and Belize); and 3) that defense demurred to use of the passport to refresh Martin's memory only by stating that defense wished to view the document—defense then had that opportunity. The remedy of a discovery violation lies within the discretion of the trial court. *See United States v. Euceda-Hernandez*, 768 F.2d 1307, 1311-12 (11th Cir.1985). Even if the defense had not mooted the point by not maintaining a proper objection, we would still have to conclude that the district court's decision, limiting the government's use of the documents, was properly within the court's discretion.

In summary, our review of the whole record and trial transcript has convinced us that there was no *Brady, Giglio,* or Jencks Act error in Valera's trial meriting reversal of defendant's conviction.

II. *Question of Variance*

[11] Valera next contends that an impermissible variance exists between the crimes charged in the indictment and the evidence adduced at trial. He alleges that while the indictment charges a single RICO enterprise and a single RICO conspiracy, the evidence produced by the government at trial shows the existence of multiple independent enterprises and multiple independent conspiracies.

"[W]hether the evidence supports finding a single conspiracy is a question of fact for the jury." *United States v. Champion,* 813 F.2d 1154, 1165 (11th Cir.1987). We review the trial evidence in the light most favorable to the government to decide whether there is substantial evidence to support the jury verdict. *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed.2d 680 (1942); *Champion,* 813 F.2d at 1166.

The indictment charges that the enterprise in this case, 18 U.S.C. sec. 1961(4), consisted of "a group of individuals associated in fact, made up of the defendants and others which engaged in and the activities of which affected interstate commerce." The pattern of racketeering, 18 U.S.C. secs. 1961(1) and (5), "involv[ed] importation, receiving, concealment, buying, selling and otherwise dealing in narcotic or other dangerous drugs, bribery and obstruction of justice."

The government asserts that the evidence produced showed that defendant Valera and others associated to import drugs into the United States. Under the government's view, the enterprise existed to achieve financial gain through facilitating the entry of drugs into this country. While there were many ventures or individual conspiracies, there was also one enterprise, one common purpose, and one over-arching conspiracy.

Appellant Valera emphasizes the evidence that showed that Valera neither knew all the participants in other ventures nor was aware of the existence of these other ventures. Appellant also emphasizes that the illegal activities began before Valera associated himself with the group and continued after the time he no longer dealt with the group. Based on these facts, appellant asserts that each venture involved a totally separate conspiracy and a separate enterprise (made up of the ndividuals participating in that specific importation.)

We must reject appellant's view of the facts. The testimony of witness Joseph Crawford provided adequate support to the idea that but one enterprise and one over-arching RICO conspiracy existed and that Valera knowingly participated in the activities of this enterprise. Crawford testified that while there was no formally structured group, he knew there that there were people upon whom he could depend to provide their services in various drug importation ventures as needed. Crawford readily accepted the analogy of the group or enterprise to a "pick-up" basketball game (an analogy suggested by defense counsel on cross-examination of the witness). The enterprise thus existed as an informal sort of business that sold its services to transport and to import drugs into this country.

Defendant Valera became a "customer" of the enterprise on several occasions, calling on the group to furnish their services to aid him in getting into America illegal drugs he had acquired or caused to be acquired elsewhere. "Mere 'customers' can indeed engage in a pattern of racketeering activity in futherance of the affairs of the enterprise." *United States v. Manzella*, 782 F.2d 533, 538 (5th Cir.1986), *cert. denied*, 476 U.S. 1123, 106 S. Ct. 1991, 90 L.Ed.2d 672 (1986).

Association, alone, with the enterprise is, of course, insufficient for violation of RICO: an individual must *agree* to participate in the affairs of the enterprise. While Valera may have been unaware of all the persons participating in other ventures and unaware of their source of drugs and their plans for distribution, there was evidence in trial testimony from which the jury could conclude that Valera was aware that others were using the enterprise—the informal group of McKenney and friends—to import drugs into the United States and that Valera agreed to participate in such activities by using the services of the group in his own ventures. " 'Agreement on an overall objective' can be proved by either an explicit agreement to participate in the enterprise or circumstantial evidence showing 'that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern or racketeering activity.' " *Id.* at 538-39 (citing *United States v. Sutherland*, 656 F.2d 1181, 1193 (5th Cir. Unit A Sept. 1981),[4] *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982); *see also United States*

[4]In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (*en blanc*), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

v. Neapolitan, 791 F.2d 489, 501 (7th Cir.) ("A RICO conspiracy, like all conspiracies, does not require direct evidence of agreement; an agreement can be inferred from the circumstances."), *cert denied*, __ U.S. ____, 107 S.Ct., 422, 93 L.Ed.2d 372 (1986).

Under pre-RICO conspiracy principles, the government may well not have been able to show a single conspiracy under the circumstances of this case, because all conspirators did not agree to any particular predicate crime. Under the RICO Act, however, a series of agreements, which pre-RICO would constitute multiple conspiracies, can form, under RICO, a single "enterprise" conspiracy. *See United States v. Elliott*, 571 F.2d 880, 902-05 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); *United States v. Tillett*, 763 F.2d 628 (4th Cir.1985) (evidence sufficient to show a single, ongoing conspiracy, organized to profit from marijuana importation, rather than separate and distinct conspiracies, even where financiers changed during course of conspiracy).

Because the government presented sufficient evidence for a reasonable jury to find that Valera agreed to participate and did participate, through at least two predicate acts, in the single enterprise of importing drugs into America for profit, as charged in the indictment, appellant's argument on this point fails.[5]

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[5]Valera mistakenly relies on our opinion in *United States v. Castro*, 829 F.2d 1038 (11th Cir. 1987), *opinion modified*, 837 F.2d 441 (11th Cir.1988), to support his position that trial evidence showed multiple offenses and conspiracies. There are, however, significant differences between Valera's case and Castro's. *Castro* was not a RICO case: defendants there were charged with a

III. *Witness Immunity*

At trial, the defense wished to call Robert Williams as a witness in order to impeach the testimony of government witnesses McKenney and Crawford. At a hearing held outside the presence of the jury, Williams was called and refused to answer questions, claiming his fifth amendment privilege. Although Williams had received an informal grant of use immunity when he testified before a grand jury in July 1985, this grant of immunity and a plea agreement between Williams and the government were yet not finalized; thus the immunity did not apply to Williams' testimony in any other instances. The district court ruled that Williams would be considered a witness unavailable with reason. The district court therefore allowed the defense to read to the jury Williams' grand jury testimony to impeach witness McKenney.[6]

non-RICO general conspiracy. We determined that two conspiracies existed in that case because two very different goals and subject matters were involved and because the government adduced no evidence that Castro, involved in a conspiracy relating to certificates of deposit, knew or should have known that action was being taken to falsify coffee inventories in order to obtain bank loans (the second conspiracy of the case).

In Valera's case, there is but one subject matter—drug importation—and one goal—profit through these importation ventures. Sufficient evidence was adduced through the testimony of co-conspirators to indicate that Valera knew or should have known that the enterprise was engaged in other drug importation ventures, similar to those in which Valera participated.

[6]Williams had not been interrogated before the grand jury on the point that Valera wished to bring out regarding Crawford.

On appeal Valera contends that Williams should not have been allowed to claim the self-incrimination privilege because a) Williams already had valid immunity; b) the government had acted unfairly in not extending the immunity granted to Williams before the grand jury to Williams' testimony in Valera's case; c) the court did not determine that Williams' testimony at Valera's trial would be self-incriminating; and d) Williams had waived his immunity by making statements to Valera's attorney.

[12] The record indicates that, at the time of Valera's trial, Williams had been given no grant of immunity in the Valera proceedings nor had he finalized his relationship with the government, as a result of the 1985 agreement relating to his grand jury testimony. These facts dispose of Valera's first claim: Williams had no valid immunity at the time his testimony was requested. *See generally Pillsbury Co. v. Conboy,* 459 U.S. 248, 256-60, 103 S.Ct. 608, 614-15, 74 L.Ed.2d 430 (1983) (civil deposition testimony tracking prior immunized testimony is not, without duly authorized assurance of immunity at that time, statutorily immunized testimony and therefore cannot be compelled).

[13] The record gives no indication of government abuse in the handling of the immunity process. While Williams' attorney indicated that he had been representing Williams in dealings with the government for three years and while Williams had testified before the grand jury approximately a year and a half before Valera's trial, there is no evidence that the government had deliberately delayed concluding its handling of Williams's case in order to deny Valera a defense witness in Valera's case.

See United States v. Sawyer, 799 F.2d 1494, 1506-07 (11 Cir.1986), *cert. denied*, __ U.S. ____, 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987). "[D]istrict courts may not grant immunity to a defense witness merely because that witness possesses essential exculpatory information unavailable from other sources." *United States v. Gottesman*, 724 F.2d 1517, 1524 (11th Cir.1984).

[14] In this case, the defense wished to question Williams about communications between himself and McKenney, who had already admitted his own involvement in drug smuggling. Williams' attorney was present at the hearing and opined that his client had an absolute fifth amendment privilege. From the record before it, the district court could properly have concluded that Williams' answers could incriminate him. Therefore, the district court correctly concluded that Williams had a right to invoke his self-incrimination privilege. *See United States v. D'Apice*, 644 F.2D 75, 77 (5th Cir. Unit B 1981).

Defendant's claim as to Williams's waiver of the self-incrimination privilege is patently frivolous. Defendant has therefore raised no meritorious ground for relief on the issue of witness immunity.

For the above reasons, defendant-appelant Valera's convictions and sentences are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3380

D.C. Docket No. 86-04

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERTO VALERA,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Before HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of convictions of the said District Court in this cause be and the same is hereby, AFFIRMED.

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*Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

Entered: May 20, 1988
For the Court: Miguel J. Cortez, Clerk

By: /S/ Kareen McNabb
Deputy Clerk

ISSUED AS MANDATE: September 14, 1988

in the

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-3380

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ROBERTO VALERA,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING
(AUG 30 1988)

BEFORE: HATCHETT and EDMONDSON, Circuit Judges, and MARKEY*, Chief Judge, Federal Court.

PER CURIAM:

The petition for rehearing filed by the appellant is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*Hon. Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA Superseding

V.	No. 86-4-Cr-Orl-
	[18 USC § 1962 -
SCOTT CHOATE MCKENNEY	20 years and/or
WAYNE P. STURMAN	$25,000]
RONALD HANSEN	[18 USC §201 (b) -
DANNY MARTIN	15 years and/or
JAMES CASEY	$20,000]
JOHN FELLER	[18 USC §201 (c) -
GERALD ANDERSON	15 years and/or
ROBERTO VALERA	$20,000
	[18 USC §371 -
	5 years and/or
	$10,000]
	[21 USC §952 (a) -
	15 years and/or
	$25,000]
	[21 USC §841 (a)
	15 years and/or
	$125,000]
	[18 USC §1952
	5 years and/or
	$10,000]

The Grand Jury charges that:

Introduction

1. At all times material to this indictment,

(1) The United States Customs Service was a service under the auspices of the Department of the Treasury, duly organized pursuant to the provisions of Title 19, United States Code, Section 2071.

(2) The United States Customs Service was required to perform such duties as the Secretary of the Treasury should, prescribe pursuant to the provisions of Title 19, United States Code, Section 2072(c).

(3) Scott Choate McKenney was employed by the United States Customs Service as a Supervisory Customs Patrol Officer assigned to the Customs Patrol Station at Cape Canaveral, Florida, Southeast Region.

(4) As a Supervisory Customs Patrol Officer, Scott Choate McKenney was authorized to carry firearms, execute and serve search warrants and arrest warrants and make arrests without a warrant for violations of any

laws of the United States relating to narcotic drugs or marihuana pursuant to the provisions of Title 26, United States Code, Section 7607.

COUNT ONE

1. The INTRODUCTION is hereby incorporated by reference.

2. From in or about June, 1979, and contin uously thereafter to on or about April 11, 1983, the precise dates being unknown to the Grand Jury, in the Middle District of Florida, and elsewhere, the defendants,

SCOTT CHOATE MCKENNEY
WAYNE P. STURMAN
RONALD HANSEN
DANNY MARTIN
JAMES CASEY
JOHN FELLER
GERALD ANDERSON
and
ROBERTO VALERA

and others who are both known and unknown to the Grand Jury, being persons employed by and associated with an enterprise engaged in, and the activities of which affected interstate commerce, wilfully and knowingly did conduct, and participate, directly and indirectly, in the conduct of the affairs of such enterprise through a pattern of racketeering activity, as hereinafter set forth in violation of Title 18, United States Code, Section 1962(c).

THE ENTERPRISE

3. The enterprise, as defined in Title 18, United States Code, Section 1961(4), was a group of individuals associated in fact, made up of the defendants and others, which engaged in and the activities of which affected interstate commerce.

THE PATTERN OF RACKETEERING ACTIVITY

4. As defined in Title 18, United States Code, Sections 1961(1) and (5), the pattern of racketeering activity consisted of at least two acts of racketeering activity involving importation, receiving, concealment, buying, selling and otherwise dealing in narcotic or other dangerous drugs, bribery and obstruction of justice.

Racketeering Act 1:

On or about January 16, 1980 in Brevard County, Florida, in the Middle District of Florida, RONALD HANSEN, WAYNE STURMAN, and others did corruptly offer to and give Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, that is a quantity of United States Currency, to induce Scott Choate McKenney to do or omit doing an act in violation of his lawful duty, to Wit:

a. WAYNE STURMAN introduced RONALD HANSEN to Scott Choate McKenney. Scott McKenney informed RONALD HANSEN that as a Supervisory Customs Patrol Officer, he could assist RONALD HANSEN and his associates in the importation of marihuana into the United

States by providing information about law enforcement activities relating to the detection, interdiction and apprehension of persons involved in the importation, possession and distribution of controlled substances.

b. Scott Choate McKenney further advised RONALD HANSEN that he could determine whether RONALD HANSEN or any of his associates were being investigated by law enforcement agencies.

c. Scott Choate McKenney further advised RONALD HANSEN that he would fly counter-surveillance during the importation of loads of marihuana to determine if the aircraft carrying marihuana was being followed by law enforcement aircraft.

d. On or about January. 16, 1980, RONALD HANSEN gave Scott Choate McKenney a quantity of United States Currency.

e. As a Supervisory Customs Patrol Officer, Scott Choate McKenney was required to investigate allegations regarding the illegal importation of controlled substances into the United States, and to apprehend individuals suspected of engaging in such activities.

f. As a Supervisory Customs Patrol Officer, Scott Choate McKenney was proscribed from engaging in or facilitating the commission of any illegal activities, including but not limited to the importa-

tion of controlled substances into the United States.

All in violation of Title 18, United States Code, Section 201 (b).

Racketeering Act 2:

On or about January 16, 1980, in Brevard County Florida, in the Middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY being a public official, did corruptly ask, demand, exact solicit, seek, accept, receive or agree to receive a thing of value, to wit a quantity of United States currency, in return for being induced to do or omit doing an act in violation of his official duty as more fully described in subparagraphs a through f of Racketeering Act 1 of Count One of this Indictment which paragraphs the Grand Jury realleges and incorporates herein; all in violation of Title 18, United States Code, Section 2O1(c).

Racketeering Act 3:

On or about January 25, 1980, in Brevard County, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN did corruptly offer to and give Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, to wit a quantity of United States currency to induce Scott Choate McKenney to do or omit doing an act in violation of his lawful duty, to wit facilitating, on or about January 25, 1980, the importation into the United States from a place outside thereof of a quantity of marihuana in a manner more fully described in subparagraphs a through c of Racketeering Act 1 of Count One of this

Indictment which paragraphs the Grand Jury realleges and incorporates herein; all in violation of Title 18, United States Code, Section 201(b).

Racketeering Act 4:

On or about January 25, 1980, in Brevard County, Florida, in the middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY being a public official, did corruptly ask, demand, exact, solicit, seek, accept, receive or agree to receive a thing of value, to wit a quantity of United States currency, in return for being induced to do or omit doing an act in violation of his official duty as more fully described in Racketeering Act 2 of Count One of this Indictment, which allegation the Grand Jury realleges and incorporates herein, all in violation of Title 18, United States Code, Section 201(c).

Racketeering Act 5:

On or about January 31, 1980, in Brevard County, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN, did corruptly offer to and give Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, to Wit a quantity of United States currency to induce Scott Choate Mckenney to do or omit doing an act in violation of his lawful duty, to wit facilitating, on or about January 31, 1980, the importation into the United States from a place outside thereof of a quantity of marihuana in a manner more fully described in subparagraphs a through c of Racketeering Act 1 of Count One of this Indictment which paragraphs the Grand Jury realleges and incorporates herein, all in violation of Title 18, United States Code, Section 2201(b).

Racketeering Act 6:

On or about January 31, 1980, in Brevard County, Florida, in the middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY being a public official, did corruptly ask, demand, exact, solicit, seek, accept, receive or agree to receive a a thing of value, to wit a quantity of United States currency, in return for being induced to do or omit doing an act in violation of his official duty as more fully described in Racketeering Act 5 of Count One of this Indictment, which allegation the Grand Jury realleges and incorporates herein, all in violation of Title 18, United States Code, Section 201(c).

Racketeering Act 7:

On or about February 20, 1980, in Brevard County, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN, did corruptly offer to and give Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, to wit a quantity of United States currency to induce Scott Choate McKenney to do or omit doing an act in violation of his lawful duty, to wit facilitating, on or about February 20, 1980, the importation into the United States from a place outside thereof of a quantity of marihuana in a manner more fully described in subparagraphs a through c of Racketeering Act 1 of Count One of this Indictment which paragraphs the Grand Jury realleges and incorporates herein; all in violation of Title 18, United States Code, Section 201(b).

Racketeering Act 8:

On or about February 20, 1980, in Brevard Coun-

ty, Florida, in the Middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY being a public official, did corruptly, ask, demand, exact, solicit, seek, accept, receive or agree to receive a thing of value, to wit a quantity of United States currency, in return for being induced to do or omit doing an act in violation of his official duty as more fully described in Racketeering Act 7 of Count One of this Indictment, which allegation the Grand Jury realleges and incorporates herein, all in violation of Title 18, United States Code, Section 201(c).

Racketeering Act 9:

On or about January 16, 1980, in Brevard and Lake Counties, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN and others attempted to import, and aided and abetted an attempt to import, into the United States from a place outside thereof, marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Sections 952(a) and 963 and Title 18, United States Code 2.

Racketeering Act 10:

(a) On or about January 25, 1980, in Lake County, Florida, in the Middle District of Florida, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of marihuana, a controlled substance listed in Schedule I, Title 21, United States

Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about January 25, 1980, in Lake County, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN and others possessed with the intent to distribute and aided and abetted the possession with the intent to distribute of a quantity or marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812 all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 11:

(a) On or about January 31, 1980, in Lake County, Florida, in the Middle District of Florida, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN, and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code,Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about January 31, 1980, in Lake County, Florida, in the Middle District of Florida and elsewhere, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN, and others possessed with the intent to distribute and aided and abetted the possession with the intent to distribute a quantity of marihuana, a controlled substance listed in Schedule

I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2.

Racketeering Act 12:

(a) On or about February 20, 1980, in Lake County, Florida, in the Middle District of Florida, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about February 20, 1980, in Lake County, Florida, in the Middle District of Florida, RONALD HANSEN, SCOTT CHOATE MCKENNEY, WAYNE STURMAN and others possessed with the intent to distribute and aided and abetted the possession with the intent to distribute a quantity of marihuana, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a) (1) and Title 18, United States Code, Section 2.

Racketeering Act 13:

From on or about February 20, 1980 through on or about March 12, 1981, in Dade and Broward Counties, in the Southern in District of Florida and elsewhere, SCOTT CHOATE MCKENNEY, WAYNE STURMAN, RONALD HANSEN and others, did unlawfully, know-

ingly and willfully conspire, combine, confederate and agree to import into the United States from a place outside thereof a guantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 963.

Racketeering Act 14:

Between on or about March 12, 1981, and on or about March 30, 1981, in Dade, Broward and Brevard Counties, Florida, in the Southern and Middle Districts of Florida, RONALD HANSEN corruptly offered, and ultimately gave to Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, to wit a quantity of United States currency, to influence McKenney commit or aid in committing or collude in or allow a fraud on the United States relating to the dismissal of federal criminal charges then pending against Ronald Hansen and Glen Gibbs in the Southern District of Florida; all in violation of Title 18, United States Code, Section 201(b).

Racketeering Act 15:

Between on or about March 12, 1981, and on or about March 30, 1981, in Dade, Broward and Brevard Counties, Florida, in the Southern and Middle Districts of Florida, SCOTT CHOATE MCKENNEY, being a public official, did corruptly solicit and receive a thing of value to wit a quantity of United States currency, in return for being influenced to commit or aid in committing a fraud on the United States relating to dismissal of federal criminal charges then pending against Ronald Hansen and Glen Gibbs in the Southern District of Florida; all in violation of Title 18, United States Code, Section 201(c).

Racketeering Act 16:

Between on or about March 12, 1981, and on or about March 30, 1981, in Dade, Broward and Brevard Counties, Florida, in the Southern and middle Districts of Florida, SCOTT CHOATE MCKENNEY and RONALD HANSEN endeavored to corruptly influence, obstruct and impede the due administration of justice by fraudulently representing, or causing to be represented, to Assistant United States Attorney Michael Patrick Sullivan of the Miami Strike Force, that RONALD HANSEN and Glen Gibbs were working for SCOTT CHOATE MCKENNEY, who was then a United States Supervisory Customs Patrol Officer, as confidential informers at the time Hansen and Gibbs were negotiating for the purchase of cocaine from certain individuals unknown by them to be law enforcement personnel, which fraudulent representations were intended to result in, and resulted in, the dismissal of criminal charges against Ronald Hansen and Glen Gibbs in Case No. 81-3050-CHS; all in violation of Title 18, United States Code, Section 1503.

Racketeering Act 17:

(a) In or about March, 1981, in Brevard County, Florida, in the Middle District of Florida, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, ROBERTO VALERA, and others imported and aided and abetted the importation into the United States from a place outside thereof of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United Section 9521a) and Title 18, United States Code, Section 2.

(b) In or about March, 1981, in Brevard County, Florida, in the Middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, ROBERTO VALERA, and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation or Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 18:

(a) On or about August 10, 1981, in Hertford County, North Carolina in the Eastern District of North Carolina, SCOTT CHOATE MCKENNEY, JAMES CASEY, JOHN FELLER, DANNY MARTIN, WAYNE STURMAN, and others imported and aided and abetted the importation into the United States from a place outside thereof of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about August 10, 1981, SCOTT CHOATE MCKENNEY, JAMES CASEY, JOHN FELLER, DANNY MARTIN, WAYNE STURMAN and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code. Section 2.

Racketeering Act 19:

(a) On or about August 17, 1981, in Brevard County, Florida, in the Middle District of Florida, SCOTT CHOATE MCKENNEY, DANNY MARTIN, and others imported, and aided and abetted the importation of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about August 17, 1981, in Brevard County, Florida, in the Middle District of Florida, SCOTT CHOATE MCKENNEY and DANNY MARTIN, and others possessed with the intent to distribute, and aided and abetted the possession with the intent to distribute a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 20:

(a) In or about October, 1981, in Hertford County, North Carolina, in the Eastern District of North Carolina, SCOTT CHOATE MCKENNEY, JAMES CASEY, JOHN FELLER, DANNY MARTIN, and others imported and aided and abetted the importation into the United States from a place outside thereof of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) In or about October, 1981, in Hertford County, North Carolina, in the Eastern District of North Carolina and elsewhere, SCOTT CHOATE MCKENNEY, JAMES CASEY, JOHN FELLER, DANNY MARTIN, and others possessed with intent to distribute, and aided and abetted, the possession with the intent to distribute of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(l) and Title 18, United States Code, Section 2.

Racketeering Act 21:

(a) On or about October, 1981, in Orlando, Florida, in the Middle District of Florida, DANNY MARTIN and ROBERTO VALERA, and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and Delaware with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

(b) In or about November, 1981, in New Castle County, Delaware in the District of Delaware, SCOTT CHOATE MCKENNEY, DANNY MARTIN, ROBERTO VALERA, and others imported and aided and abetted the importation into the United States from a place outside thereof of a quantity of hashish, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(c) In or about November, 1981, in New Castle County, Delaware, in the District of Delaware and elsewhere, SCOTT CHOATE MCKENNEY, DANNY MARTIN, ROBERTO VALERA, and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute of a quantity of hashish, a controlled substance listed in Schedule I, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 22:

(a) On or about October 3, 1982, in Orlando, Florida, in the Middle District of Florida, and elsewhere, DANNY MARTIN and ROBERTO VALERA, and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and Belize with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

Racketeering Act 23:

(a) On or about December 10, 1982, in Orlando, Florida, in the Middle District of Florida, and elsewhere, DANNY MARTIN and ROBERTO VALERA, and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and Gambia with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

Racketeering Act 24:

(a) On or about November 4, 1982, in Lake County, Florida, in the Middle District of Florida, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about November 4, 1982, in Lake County, Florida, in the Middle District of Florida and elsewhere, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute, a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21,

United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 25:

(a) On or about December 9, 1982, in Clinch County, Georgia, in the Middle District of Georgia, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about December 9, 1982, in Clinch County, Georgia, in the Middle District of Georgia and elsewhere, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute, a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a) (l) and Title 18, United States Code, Section 2.

Racketeering Act 26:

On or about and between December 30, 1982 and January 4, 1983 in Orange County, Florida, in the Middle District of Florida, in San Francisco, California in the Northern District 29 of California and elsewhere, GERALD ANDERSON, and others traveled and caused travel in interstate or foreign commerce between the

Middle District of Florida and San Francisco, California with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, and further to distribute the proceeds of said unlawful activity in violation of Title 18, United States Code, Sections 1952 and 2.

Racketeering Act 27:

(a) On or about February 6, 1983, in Clinch County, Georgia, in the Middle District of Georgia, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others imported and aided and abetted the importation into the United states from a place outside thereof a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 952(a) and Title 18. United States Code, Section 2.

(b) On or about February 6, 1983, in Clinch county Georgia, in the Middle District of Georgia and elsewhere, SCOTT CHOATE MCKENNEY, JOHN FELLER, DANNY MARTIN, and others possessed with intent to distribute, and aided and abetted the the possession with the intent to distribute, of a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

Racketeering Act 28:

(a) On or about April 10, 1983, in Clinch County, Georgia, in the Middle District of Georgia, SCOTT CHOATE MCAENNEY, DANNY MARTIN, GERALD ANDERSON, and others imported and aided and abetted the importation into the United States from a place outside thereof a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; a11 in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

(b) On or about April 10, 1983, in Clinch Countg, Georgia, in the Middle District of Georgia and elsewhere, SCOTT CHOATE MCKENNEY, DANNY MARTIN, GERALD ANDERSON, and others possessed with intent to distribute, and aided and abetted the possession with the intent to distribute, a quantity of cocaine, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

All in violation of Title 18, United States Code, Section 1962(c), and Title 18, United States Code, Section 2.

COUNT TWO

1. The Grand Jury realleges and incorporates by reference the INTRODUCTION to this indictment.

2. From in or about June 1979, through on or about April 11, 1983, the precise dates being unknown to the

Grand Jury, in the Middle District of Florida and elsewhere, the Defendants,

SCOTT CHOATE MCKENNEY
WAYNE P. STURMAN
RONALD HANSEN
DANNY MARTIN
JAMES CASEY
JOHN FELLER
GERALD ANDERSON
and
ROBERT VALERA

and others who are both known and unknown to the Grand Jury being employed by and associated with the enterprise described in Count One, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree to conduct and participate, directly and indirectly, in the affairs of said enterprise, with which they were associated and, which was engaged in, and the activities of which affected interstate commerce, through a pattern of racketeering activities in violation of Title 18, United States Code, Section 1962(c).

3. The pattern of racketeering activity consists of those acts outlined in acts 1 through 28 of Count One incorporated herein by reference.

THE MANNER AND MEANS OF THE CONSPIRACY

A. *In General*

4. It was a part of the conspiracy that the defendants and others would directly and indirectly offer, promise

and give things of value to a public official, that is Scott Choate McKenney, a Supervisory Customs Patrol Officer of the United States Customs Service, to influence said public official to commit or aid in committing, or collude in, or allow, a fraud on the United States and to induce said public official to do or omit doing acts in violation of his lawful duty.

5. It was further a part of the conspiracy that a public official, that is Scott Choate McKenney, a Supervisory Customs Patrol Officer of the United States Customs Service, directly or indirectly, corruptly ask, demand, exact, solicit, seek, accept, receive or agree to receive a thing of value for himself in return for being influenced to commit or aid in committing or collude in or allow a fraud on the United States and to be induced to do or omit doing acts in violation of his official duty.

6. It was further a part of the conspiracy that Scott Choate McKenney, a Supervisory Customs Patrol Officer of the United States Customs Service, provide defendants with information regarding law enforcement activities or the United States Customs Service, including, but not limited to:

(a) specific radio frequencies utilized by the United States Customs Service and other law enforcement agencies for communications purposes;

(b) a description of surveillance methods and equipment utilized by the United States Customs Service and other law enforcement agencies in detecting, interdicting, and apprehending persons involved in importing, possessing and distributing controlled substances including cocaine and marihuana;

(c) the location and times of operation of ground and air surveillance equipment and personnel responsible for detecting, interdicting and apprehending persons involved in importing, possessing and. distributing controlled substances including cocaine and marihuana;

(d) whether participants in the conspiracy were suspected of engaging in illegal activity or were actively under investigation by the United States Customs Service or other law enforcement agencies.

7. It was further a part of the conspiracy that defendants import into the United States, and possess and distribute, large quantities of controlled substances including cocaine and marihuana.

8. It was further a part of the conspiracy that Scott Choate McKenney, a Supervisory Customs Patrol Officer of the United States Customs Service, participate in the importation into the United States of controlled substances including cocaine and marihuana by:

(a) meeting with defendants to plan the manner and means of importing cocaine and marihuana into the United States;

(b) flying counter-surveillance during the importation of cocaine and marihuana into the United States;

(c) monitoring law enforcement radio frequencies during the importation of cocaine and marihuana into the United States and

(d) covering up, or aiding in the covering up of, the illegal importation activities of defendants when detected by the United States Customs Service or other law enforcement agencies.

B. Roles of the Defendants

9. It was further a part of the conspiracy that defendants played one or more of the following roles, among others, in conducting and participating, directly and indirectly, in the affairs of the enterprise:

a. Corrupt Supervisory Customs Patrol Officer who:

(1) would provide co-defendants with information about law enforcement agencies and their activities, which information was designed to facilitate the illegal importation of quantities of cocaine and marihuana into this country without being detected;

(2) would monitor law enforcement investigative activities and reports to determine whether any co-conspirators were under investigation or suspected of criminal activity;

(3) would monitor the activities of law enforcement agencies during the importation and/or distribution of quantities of cocaine and marihuana by co-conspirators to determine whether such importation and/or distribution had been detected by said agencies;

(4) would conduct aerial counter-surveillance during the importation of quantities of cocaine and marihuana to determine whether aircraft utilized for such importation were being followed by law enforcement agency aircraft.

b. Suppliers of bulk quantities of cocaine and marihuana for importation from South America into the United States.

c. Buyers who would negotiate with suppliers for the purchase of quantities of cocaine and marihuana, arrange for times, places, and means for such cocaine and marihuana to be picked up, imported into the United States and delivered to distribution points.

d. Aircraft pilots and co-pilots who would fly planes from the United States to South America and return with quantities of cocaine and marihuana.

e. Aircraft maintenance personnel who would prepare aircraft for round-trip flights from the United States to South America, maintain aircraft prior to, during, and after flights, fuel aircraft prior to and during trips and make repairs to aircraft as needed.

f. Communications personnel who would maintain radio contact with aircraft utilized in the importation of quantities of cocaine and marihuana.

g. Security personnel who would conduct counter-surveillance during the off-loading of cocaine and marihuana from aircraft,

h. Off-loaders who would remove the cocaine and marihuana from aircraft and transfer it to vehicles for transportation to various distribution points.

i. Transporters who would meet incoming flights and transport cocaine and marihuana to various locations for distribution.

j. Distributors who would receive large quantities of cocaine and marihuana and distribute said cocaine and marihuana in smaller quantities to other individuals.

10. In furtherance of and to affect the objects of the conspiracy, and to accomplish its purposes and its objective, the defendants did and committed the following overt acts, amongst others, in the Middle District of Florida and elsewhere:

OVERT ACTS

1. On or about January 15, 1980, Ronald Hansen, Glen Gibbs, Hubert Anderson, Bobby Suggs and others met at Ronald Hansen's house in Miami and discussed the proposed importation of marihuana into Lake County, Florida to take place the following day.

2. On or about January 16, 1980, Joseph Crawford and Donald Whitford flew N87654 from Titusville, Florida to Colombia, South America.

3. On or about January 16, 1980, Ronald Hansen, Hubert Anderson, Wayne Sturman, Bobby Suggs, Glen Gibbs and others met at the Holiday Inn in Titusville, Florida and discussed the flight of N87654 from Florida to Colombia and back again which took place earlier that day.

4. On January 16, 1980 Ronald Hansen gave Wayne Sturman a quantity of United States currency at the Holiday Inn in Titusville, Florida.

5. On January 16, 1980 Scott Mckenney received a guantity of United States currency from Wayne Sturman.

6. On or about January 20, 1980, Joseph Crawford and Donald Whitford flew N87654 to Colombia, South America.

7. On or about January 25, 1980, Wayne Sturman and Ronald Hansen transported motor oil from Titusville, Florida to Lake County, Florida to be used in a DC-3 aircraft bearing tail number N87654.

8. On or about January 31, 1980, Joseph Crawford and Donald Whitford flew a DC-3 aircraft bearing tail number N87654, from Titusville, Florida to Colombia, South America.

9. On or about February 20, 1980, Joseph Crawford and Donald Whitford flew a DC-3 aircraft bearing tail number N87654 from Titusville, Florida to Colombia, South America.

10. On or about February 20, 1980, at Titusville, Florida, Wayne Sturman and Scott McKenney, prevented agents of the Drug enforcement Administration from

boarding N87654, which was parked on Wayne Sturman's ramp.

11. On or about February 20, 1980, at Titusville, Florida, Wayne Sturman falsely alleged that he had leased the above-described DC-3 to George Morton and Associates who had parked the plane on his ramp and locked it.

12. On or about February 20, 1980, Wayne Sturman removed from the DC-3 airplane parked on his ramp various items of personal property belonging to Joseph Crawford and Donald Whitford.

13. Scott McKenney shortly prior to March 1981, leased a Twin Comanche aircraft bearing tail Number N8774Y.

14. On or about March 1981, Joseph Crawford flew the above-described Twin Comanche from Merritt Island, Florida to Colombia, South America.

15. Some time after March 1981, Scott McKenney and Joseph Crawford travelled to Miami, Florida and met with Roberto Valera.

16. At that meeting Roberto Valera paid Scott McKenney and Joseph Crawford a quantity of United States currency.

17. On or about August 9, 1981, Joseph Crawford and James Casey travelled to Colombia, South America from Merritt Island, Florida.

18. Shortly prior to October 1981, Danny Martin and Joseph Crawford travelled to Miami, Florida and

met with Roberto Valera.

19. In or about October 1981, Danny Martin purchased radio equipment with funds supplied by Roberto Valera.

20. On or about October 22, 1981, Joseph Crawford, Lionel James Casey, John Feller, Ben Coleman and others met at the Holiday Inn at Merritt Island.

21. On or about October 23, 1981, Ben Coleman, Joseph Crawford and an unknown Colombian flew from Merritt Island, Florida to Colombia, South America in the above-described Cessna 310 aircraft.

22. Shortly prior to October 3, 1982, Danny Martin purchased radio equipment with funds supplied by Roberto Valera.

23. On or about and between November 3, 1982 and November 4, 1982 John Feller travelled from Orlando, Florida to Valdosta, Georgia.

24. On or about November 3, 1982, Joseph Crawford and Ben Coleman flew from Orlando, Florida to Colombia, South America in the above-described Cessna 310 aircraft.

25. On or about November 4, 1982, Danny Martin travelled from Orlando, Florida to Leesburg, Florida.

26. Shortly prior to December 10, 1982, Danny Martin purchased radio equipment with funds supplied by Roberto Valera.

27. On or about December 8, 1982, Joseph Crawford and Bruce Futch flew a Twin Comanche aircraft bearing tail number N8055Y from Orlando, Florida to Colombia, South Carolina.

28. On or about December 9, 1982, John Feller travelled from Orlando, Florida to Valdosta, Georgia.

29. On or about and between February 5, 1983 and February 6, 1983, John Feller travelled from Orlando, Florida to Valdosta, Georgia.

30. On or a6out February 5, 1983, Joseph Crawford and Bruce Futch travelled from Orlando, Florida to Colombia, South America in the above-described Twin Comanche aircraft.

31. On or about April 8, 1983, Gerald Anderson purchased a 1982 Ford LTD automobile from Bob Williams.

32. On or about April 8, 1983, Joseph Crawford and Bruce Futch flew from Orlando, Florida to Colombia. South America in the above-described Twin Comanche aircraft.

33. All the racketeering acts listed in Count One of the indictment are hereby incorporated as overt acts of this conspiracy by reference.

All in violation of Title 18, United States Code, Section 1962(d).

COUNT THREE

On or about and between March 12, 1981 to March

31, 1981, in Brevard County, Florida, in the Middle District of Florida,

RONALD HANSEN

defendant herein, did corruptly offer to and give Scott Choate McKenney, a United States Supervisory Customs Patrol Officer, a thing of value, to wit a guantity of United States currency, to influence Scott Choate McKenney to commit or aid in committing or collude in or allow a fraud on the United States to wit:

1. Ronald Hansen and Glenn Gibbs were arrested on March 12, 1981, in the Southern District of Florida, Miami Division and charged by criminal complaint in Case No. 81-3050-CHS with a Violation of Title 21, United States Code, Section 846.

2. On or about and between March 15, 1981 and March 31, 1981, Scott Choate McKenney, who was then employed as a United States Supervisory Customs Patrol Officer assigned to the Customs Patrol Station at Port Canaveral, met with Ronald Hansen and Glenn Gibbs.

3. During his meeting with Ronald Hansen and Glenn Gibbs, Scott Choate McKenney was provided information by Hansen and Gibbs about their various activities giving rise to the charges in Case No. 81-3050-CHS, including information about meetings with persons then unknown by Hansen and Gibbs to be undercover law enforcement personnel.

4. During his meeting with Ronald Hansen and Glenn Gibbs, Scott Choate McKenney agreed to intercede on behalf of Hansen and Gibbs by falsely represent-

ing to other federal law enforcement personnel and federal prosecutors that Hansen and Gibbs were working as confidential informers for him during the course of their activities giving rise to the charges in Case No. 81-3050-CHS and requesting that such charges be dropped.

5. During the above-described meeting, Ronald Hansen agreed to pay Scott Choate McKenney a quantity of United States Currency for McKenney's efforts to get the charges then pending against Ronald Hansen and Glenn Gibbs dropped.

6. On March 24, 1981, Scott Choate McKenney met with Assistant United States Attorney Michael Patrick Sullivan and represented that Hansen and Gibbs had been working as confidential informers during the drug negotiations for which they were charged.

7. On or about March 31, 1981 or sometime thereafter the charges against Glen Gibbs and Ronald Hansen in case number 81-3050-CHS were dismissed. Ronald Hansen gave Scott Choate McKenney a quantity of United States Currency for his role in seeking the dismissal of charges against Hansen and Gibbs in Case No. 81-3050-CHS.

All in violation of Title 18, United States Code, Section 201(b).

COUNT FOUR

On or about March 31, 1981, in Brevard County, Florida, in the Middle District of Florida,

defendant herein, being a public official, did corruptly receive a thing of value, to wit a quantity of United States currency, in return for being influenced to commit or, aid in committing a fraud on the United States as more fully described in paragraphs 1 through 7 of Count Three of this Indictment, which paragraphs the Grand Jury realleges and incorporates herein; all in violation of Title 18, United States Code, Section 201(c).

COUNT FIVE

From on or about March 12, 1981, continuing to on or about March 31, 1981, in the Middle District of Florida and elsewhere,

RONALD HANSEN

and

SCOTT CHOATE MCKENNEY

knowingly did conspire, combine, confederate, cooperate, and agree together and with divers other persons, both known and unknown to the Grand Jury, endeavor to corruptly influence, influence, obstruct and impede the due administration of justice by fraudulently representing, or causing to be represented, to Assistant United States Attorney Michael Patrick Sullivan of the Miami Strike Force in Miami, Florida, that Ronald Hansen and Glenn Gibbs were working for Scott Choate McKenney, who was then a United States Supervisory Customs Patrol Officer, as confidential informers at the time Hansen and Gibbs were negotiating for the purchase of cocaine

from certain individuals unknown by Hansen and Gibbs to be law enforcement personnel, which fraudulent representations were intended to result in, and resulted in, the dismissal of charges against Ronald Hansen and Glen Gibbs in Case No. 81-3050-CHS in violation of Title 18, United States Code, Section 1503, and in furtherance of such conspiracy, and in order to effect the object thereof, the defendants committed, among others, the following overt acts:

OVERT ACTS

(1) On or about and between March 12, 1981, and March 31, 1981, Scott Choate McKenney travelled to Fort Lauderdale, Florida and met with Ronald Hansen and Glen Gibbs concerning charges then pending against Hansen and Gibbs in the Southern District of Florida in Case No. 81-3050-CHS relating to a conspiracy to distribute cocaine.

(2) On or about March 24, 1981, Scott Choate McKenney met with Assistant United States Attorney Michael Patrick Sullivan at the Miami Strike Force Office in Miami, Florida.

(3) On or about March 24, 1981, Scott Choate McKenney falsely represented to Assistant United States Attorney Michael Patrick Sullivan that Ronald Hansen and Glen Gibbs had been working for him as confidential informers on or about March 10, 1981, when they met with undercover law enforcement personnel and discussed purchasing large quantities of cocaine.

(4) On or about March 31, 1981, Ronald Hansen gave Scott Choate McKenney a quantity of United States

currency for McKenney's assistance in seeking the dismissal of charges against Hansen and Gibbs in Case No. 81-3050-CHS. All in violation of Title 18, United States Code, Section 371.

COUNT SIX

On or about November 4, 1982, in Lake County, Florida, in the Middle District of Florida, and elsewhere

SCOTT CHOATE MCKENNEY
JOHN FELLER
and
DANNY MARTIN

defendants herein, did knowingly, intentionally and unlawfully import into the United States from a place outside thereof, a quantity of cocaine hydrochloride, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

COUNT SEVEN

On or about November 4, 1982, in Lake County, Florida, in the Middle District of Florida, and elsewhere

SCOTT CHOATE MCKENNEY
JOHN FELLER
and
DANNY MARTIN

defendants herein, did knowingly, willfully and intentionally, possess and aid and abet the possession with

intent to distribute a quantity of cocaine hydrochloride, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812, in violation of Title 21, UNITED States Code, Sections 841(a) (l) and Title 18, United States Code, Section 2.

COUNT EIGHT

In or about October, 1981, in Orlando, Florida, in the Middle District of Florida, and elsewhere, the defendants,

DANNY MARTIN
and
ROBERTO VALERA

and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and Delaware with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT NINE

On or about October 3, 1982, in Orlando, Florida, in the Middle District of Florida, and elsewhere, the defendants,

DANNY MARTIN
and
ROBERTO VALERA

and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and Belize with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT TEN

On or about December 10, 1982, in Orlando, Florida, in the Middle District of Florida, and elsewhere, the defendants,

DANNY MARTIN
and
ROBERTO VALERA

and others traveled and caused travel in interstate or foreign commerce between the Middle District of Florida and, Gambia with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT ELEVEN

On or about December 9, 1962, in Orange and Lake Counties, Florida, in the Middle District of Florida,

SCOTT CHOATE MCKENNEY
JOHN FELLER
and
DANNY MARTIN

defendants herein, did knowingly and unlawfully possess and aid and abet in the possession with intent to distribute a quantity of cocaine hydrochloride, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT TWELVE

On or about and between December 30, 1982 and January 4, 1983, in Orlando, Florida, in the Middle District or Florida, in San Francisco, California and elsewhere,

GERALD ANDERSON

and others travelled and caused travel in interstate or foreign commerce between the Middle District of Florida and San Francisco, California with intent to promote, manage, establish, carry on and facilitate an unlawful business enterprise involving controlled substances and thereafter performed or attempted to perform acts to promote, manage, establish, carry on and facilitate said enterprise, and further to distribute the proceeds of said unlawful activity in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT THIRTEEN

On or about February 6, 1983, in Orange and Lake COUNTIES, Florida, in the Middle District of Florida, and elsewhere

SCOTT CHOATE MCKENNEY
DANNY MARTIN
and
JOHN FELLER

defendants herein, did knowingly and unlawfully possess with intent to distribute a quantity of cocaine hydrochloride, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

COUNT FOURTEEN

On or about April 11, 1983, in Seminole County, Florida, in the Middle District of Florida and elsewhere,

GERALD ANDERSON

did knowingly and unlawfully possess with intent to distribute approximately twenty kilograms of cocaine hydrochloride, a controlled substance listed in Schedule II, Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL

By /s/ ROBERT H. WHITE
ROBERT H. WHITE
Foreman

ROBERT W. MERKLE
United States Attorney

By /s/ GARRY J. STEGELAND
Garry J. Stegeland
Assistant United States Attorney

By /s/ WALTER J. POSTULA
Walter J. Postula
Managing Assistant U.S. Attorney

I certify the foregoing to be a true and correct copy of the original.

DONALD M. CINNAMOND, Clerk
United States District Court
Middle District of Florida

By /s/ JUDY ZIMMERMAN
JUDY ZIMMERMAN
Deputy Clerk

EXCERPTS FROM TESTIMONY OF JOSEPH E. CRAWFORD

CONTINUED CROSS-EXAMINATION (P. 88)
BY. MR. CLAY:

Q. Mr. Crawford, I would like to state to you some names. I want to ask you a question, ask you to listen carefully to the names.

A. Okay.

Q. Scott McKenney, Wayne Sturman, Ron Hansen, Dan Martin, James Casey, John Feller, Gerald Anderson and Roberto Valera.

Now, my question to you is, sir: Did all of these (P. 89) people and yourself work tógether as one group on joint projects to smuggle drugs into this country? Yes or no.

A. You're saying all the people that you named?

Q. Correct.

A. That is not correct.

Q. So, isn't t true that that group of people whose names I just read to you, including yourself, are not organized together?

A. That's correct. They were not.

Q. Okay. Hansen had his own group, did he not?

A. That's correct, sir.

Q. Casey had his own group?

A. That's correct.

Q. Feller – did he have his own group or was he part of somebody else's group, or both?

A. He was – the Feller situation was – there was a few of us that put together something. We really didn't have anybody boss or any head of the situation, just some expertise. We did a couple of trips together as friends, I guess. There was no real boss or any real person that called the shots on that.

Feller is the one that had the connections with (P. 90)
the Colombian and engineered that. But, that does not necessarily make him the boss.

Q. Gerald Anderson. Was Anderson – was he his own group?

A. Yes.

Q. Gerald Anderson is the attorney?

A. That's correct.

Q. Was Gerry Anderson involved in the loads flown from Homerville, Georgia?

A. Only one load.

Q. Now, according to you, Roberto Valera is another separate group, is that what you're saying?

A. Yes.

Q. According to you, Valera has nothing whatsoever to do with Sturman, correct?

A. To my knowledge, that's correct.

Q. According to you, Valera has nothing whatsoever to do with Hansen?

A. That's correct.

Q. According to you, Valera has nothing whatsoever to do with Casey, correct?

A. Yes. That's correct.

Q. And, according to you, Valera has nothing to do with Anderson?

A. That's correct. (P. 91)

Q. And, according to you, as far as you know, Feller never met Valera, is that right?

A. That's right.

Q. Now, since you have testified that Valera had nothing to do with all of these other groups, isn't it true that as far as you know, Valera did not even know of the existence of the other groups, their criminal activities?

A. He did not.

Q. Okay. And, as far as you know, isn't it true that the other groups, Hansen, Casey, Anderson, et cetera, did not know what the other groups were doing?

A. That's correct.

EXCERPTS FROM TRIAL COURT'S INSTRUCTIONS TO JURY (5-16)

Count One of the Indictment in this case charges from on or about June, '79 and continuously thereafter up to on or about April 11, 1983, the Defendant was a person associated with an enterprise engaged in activities which affected interstate commerce and that he knowingly and willfully participated in the conduct of the enterprises through a pattern of racketeering activies in violation of the law.

The term "enterprise" includes any partnership, corporation, association or other legal entity or any union (5-17)
or group of individuals associated in fact, although not a legal entity.

The term "racketeering activity" includes any act in violation of the narcotic and drug laws including possession of controlled substances with intent to distribute or importation of controlled substances or travel in interstate or foreign commerce in aid of racketeering.

The term "pattern of racketeering" requires at least two acts of racketeering activity, sometimes called predicate offenses which must have been committed within ten years of each other, one of which must have occurred after October 15, 1970.

In order to establish that the Defendant who is named in Count One of the Indictment committed the offense therefore charged, there are five specific facts which must be proven. And whenever I say a fact must be proven, as I earlier said to you, it means that a fact and each fact and all facts that are necessary to constitute a conviction, which are elements of the offense must be proven beyond a reasonable doubt; first, that the Defendant was associated with an enterprise as (5-18)
defined in these instructions during the time of the alleged racketeering action as alleged in the Indictment.

Second, that the Defendant knowingly and willfully committed or knowingly and willfully aided and abetted in the commission of at least two predicate offenses hereinafter specified.

Three, that the two predicate offenses allegedly committed by the Defendant were connected with each other by some common scheme, plan or motion so as to be a pattern of criminal activity and not merely a series of separate isolated or disconnected acts.

Fourth, that through the commission of the two or more connected offenses, the Defendant conducted or participated in the conduction of the enterprise affairs; and

Fifth, that the enterprise was engaged in or that the activities affected interstate commerce.

Supreme Court, U.S.
FILED
APR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-1308

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERTO VALERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

QUESTIONS PRESENTED

1. Whether the evidence at trial established the existence of a single racketeering enterprise and a single racketeering conspiracy.

2. Whether the evidence was sufficient to establish the existence of a racketeering enterprise with an ascertainable structure distinct from the pattern of racketeering activity.

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ROBERTO VALERA, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 845 F.2d 923.

JURISDICTION

The judgment of the court of appeals (Pet. App. A17) was entered on May 20, 1988. A petition for rehearing was denied on August 30, 1988. Pet. App. A18-A19. On October 28, 1988, Justice Kennedy granted an extension of time within which to file a petition for a writ of certiorari to and including November 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (Count 1), and conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2). He was also convicted of two counts of interstate travel with intent to facilitate an unlawful activity, in violation of 18 U.S.C. 1952 (Counts 8 and 9).[1] He was sentenced to consecutive 15-year terms of imprisonment on Counts 1 and 2, and concurrent terms of four years' imprisonment on Counts 8 and 9. In addition, he was fined $25,000 on each of Counts 1 and 2.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A3) and in the government's brief in the court of appeals (Gov't C.A. Br. 5-10). It showed that petitioner was associated with a group of people that specialized in the transportation and importation of controlled substances. The group operated from June 1979 until April 1983. Petitioner's activities in connection with the group took place in 1981 and 1982, when he directed the importation of large amounts of cocaine and hashish using the group's services.

In February 1981, petitioner met Scott McKenney, who was at that time a U.S. Customs officer. For several years, McKenney had been using his knowledge of customs procedures to facilitate the transportation and importation of drugs into the United States. Petitioner asked McKenney to arrange the importation of a large shipment of cocaine

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[1] Petitioner was acquitted on one other count of interstate travel to facilitate an unlawful activity. Petitioner was tried alone; two of his co-defendants were fugitives and the others entered guilty pleas.

from petitioner's source in Colombia. McKenney knew several people that he called upon from time to time to help in drug importation ventures. For petitioner's operation, McKenney obtained the services of pilot Joseph Crawford and communications expert Danny Martin. In March 1981, Crawford flew 65 kilograms of cocaine from Colombia to Merritt Island, Florida, for petitioner. Martin installed the aircraft radar and provided communications support during the flight. Petitioner paid McKenney $70,000 for organizing the venture. Pet. App. A2; Gov't C.A. Br. 5.

During the spring and summer of 1981, petitioner met several times with McKenney, Crawford, and Martin. Petitioner discussed his plans for importing hashish aboard a freighter that would sail to a port in Delaware. Petitioner also planned to bring hashish from the Middle East into the United States via Belize. For the latter venture, petitioner hoped to use a large jet to transport the hashish to Belize, where the drugs would be transferred to smaller aircraft for importation into the United States. Pet. App. A3. McKenney advised petitioner on how to avoid interdiction for both ventures. Gov't C.A. Br. 5.

In the fall of 1981, petitioner directed Martin to travel to Delaware and set up communications equipment for the freighter venture. Petitioner also had Crawford fly a plane from Florida to Delaware to provide aerial security for the same operation. Martin maintained contact with the freighter as it approached the Delaware coast and notified petitioner when the drugs were eventually off-loaded. Pet. App. A3; Gov't C.A. Br. 6.

In the fall of 1982, petitioner directed Martin and Crawford to travel to Belize to make preparations for the Middle East hashish importation. Martin set up radar and communications at a clandestine airstrip. He and Crawford investigated the possibility of landing a large

jet on a nearby road, but they reported to petitioner that the road was too narrow to accommodate the landing gear of the large aircraft. Pet. App. A3; Gov't C.A. Br. 6-7. Petitioner then sent Martin to Senegal to set up communications equipment there. Pet. App. A3.

McKenney, Crawford, and Martin all testified against petitioner at his trial. They recounted in detail their association between 1981 and 1983 in drug smuggling operations. Throughout the period in which the group functioned together, McKenney used his U.S. Customs experience to provide security and to facilitate the importation of narcotics, Crawford acted as a pilot, and Martin served as a communications expert. At trial, Crawford characterized McKenney as his boss in the drug smuggling operations, and he characterized himself as Martin's boss. Martin testified that he worked primarily at Crawford's direction. McKenney testified that the three of them worked together. Gov't C.A. Br. 9-10.

2. On appeal, petitioner contended, inter alia, that although the indictment charged a single RICO enterprise and a single RICO conspiracy, the evidence at trial showed the existence of multiple independent enterprises and multiple conspiracies. The court of appeals rejected that argument, concluding (Pet. App. A11) that the evidence was sufficient for the jury to conclude "that but one enterprise and one overarching RICO conspiracy existed and that [petitioner] knowingly participated in the activities of this enterprise."

The enterprise in question, the court noted (Pet. App. A11), "existed as an informal sort of business that sold its services to transport and to import drugs into this country." Petitioner "became a 'customer' of the enterprise on several occasions, calling on the group to furnish their services to aid him in getting into America illegal drugs he had acquired or caused to be acquired elsewhere." *Id.* at

A12. The court noted (*ibid.*) that "[w]hile [petitioner] may have been unaware of all the persons participating in other ventures and unaware of their source of drugs and their plans for distribution, there was evidence in trial testimony from which the jury could conclude that [petitioner] was aware that others were using the enterprise—the informal group of McKenney and friends—to import drugs into the United States and that [petitioner] agreed to participate in such activities by using the services of the group in his own ventures." The court accordingly concluded that the evidence was sufficient for the jury to conclude "that [petitioner] agreed to participate and did participate, through at least two predicate acts, in the single enterprise of importing drugs into America for profit, as charged in the indictment" (*id.* at A13).

ARGUMENT

1. Relying on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), petitioner renews his contention (Pet. 14-18) that the evidence at trial revealed the existence of multiple enterprises and multiple conspiracies, not the single enterprise and the overarching RICO conspiracy charged in the indictment. The court of appeals properly rejected this argument based on the evidence at trial. In any event, that factbound determination does not warrant further review. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

The court of appeals found adequate evidence to support the jury's conclusion "that but one enterprise and one overarching RICO conspiracy existed and that [petitioner] knowingly participated in the activities of this enterprise" (Pet. App. A11). Crawford testified that the group existed as an informal business that sold its services to transport and import drugs into this country. He likened the group's

operations to a "pick-up" basketball game, composed of certain people who would be called upon to provide their particular services in various drug importation ventures as needed. The personnel who worked on any given importation might vary somewhat from venture to venture, but there nevertheless existed an overall group whose services were for sale for similar drug importations. *Ibid.*

Petitioner became a "customer" of this enterprise on several occasions, calling on the group to assist him in transporting into the country illegal drugs that petitioner had acquired elsewhere. The court of appeals correctly noted that, as a customer, petitioner could be guilty of violating the RICO statute by participating in the affairs of the enterprise through a pattern of racketeering activity. *United States* v. *Manzella*, 782 F.2d 533, 538 (5th Cir.), cert. denied, 476 U.S. 1123 (1986). The court also found that, although petitioner may not have known all the actors in the larger group who were working on other schemes, there was evidence to show that he was aware that others like himself were making use of McKenney's enterprise. Petitioner's agreement to participate in the activities of the enterprise could thus be inferred from his use of its services in his own ventures. Pet. App. A12. In short, the court of appeals correctly found an adequate basis in the evidence for finding that one overall enterprise and conspiracy existed for the single purpose of importing illegal drugs and that petitioner knowingly participated in the conspiracy and the affairs of that enterprise through a pattern of racketeering activity.

2. Relying on *United States* v. *Turkette*, 452 U.S. 576 (1981), petitioner also contends (Pet. 6-14) that the government failed to establish the existence of a RICO enterprise separate and distinct from the pattern of racketeering activity that was proved at trial. This conten-

tion is simply a slight variation on his first argument—that the government failed to establish the existence of a single enterprise and an overarching conspiracy—and it fails for the same reason.

a. The RICO statute requires proof not only of a pattern of racketeering activity but also of an "enterprise." A pattern of racketeering activity is a collection of acts (18 U.S.C. 1961(5)); an enterprise, by contrast, is either a legal entity or a collection of persons, including "any * * * group of individuals associated in fact" (18 U.S.C. 1961(4)). In *Turkette,* this Court discussed the distinction between the two elements in the course of holding that an "enterprise" does not have to have a legitimate purpose, but can be wholly illegitimate. The Court stated (452 U.S. at 583) that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." In pointing out that the enterprise and the pattern of racketeering activity are two separate elements of a RICO violation, however, the Court in no way suggested that the enterprise could not be proved, as it was here, by showing that a continuing association of individuals who shared a common purpose acted together to commit a series of racketeering acts. Any such suggestion would have been inconsistent with the Court's holding that an enterprise may be a group of individuals associated for wholly illegitimate purposes. Moreover, the Court expressly recognized that the proof used to establish the pattern of racketeering activity "may in particular cases coalesce" with the proof offered to establish the enterprise element of RICO (*ibid.*).

The court of appeals properly concluded in this case that the government satisfied its burden of proving the existence of an enterprise distinct from the individual acts of racketeering committed by its members. As the court explained, the enterprise in question "existed as an informal

sort of business that sold its services to transport and to import drugs into this country" (Pet. App. A11). The personnel who worked on any given importation might vary somewhat from venture to venture, but there nevertheless existed an overall group whose services were for sale for similar drug importations (*ibid.*). The members of that enterprise had assigned roles: McKenney used his Customs experience to provide security and to facilitate the importation of narcotics, Crawford acted as a pilot, and Martin served as a communications expert. The enterprise even had an established hierarchy, whereby Martin reported to Crawford, and Crawford reported to McKenney. See Gov't C.A. Br. 9-10. The evidence was thus plainly sufficient to establish the existence of an "enterprise" within the meaning of the RICO statute.

b. Petitioner contends (Pet. 8) that, in order to establish the existence of an "enterprise," the government must show not only the existence of an entity separate and apart from the pattern of racketeering activity in which it engages, but also that the entity has "an ascertainable structure distinct from that inherent in the pattern of racketeering activity." It is not at all clear from that formulation what additional proof petitioner believes is required. The members of the enterprise in question here had distinct roles and operated in a hierarchical relationship. Such proof is surely sufficient to establish that the enterprise had an "ascertainable structure" which—because it persisted over time and was repeatedly reflected in the individual acts of racketeering—was distinct from those individual acts of racketeering.

None of the cases upon which petitioner relies (Pet. 8) demands any more proof of the existence of an enterprise than was presented here. In *United States* v. *Riccobene*, 709 F.2d 214, 222 (3d Cir.), cert. denied, 464 U.S. 849 (1983),

the court of appeals concluded that *Turkette* requires the government to prove that the enterprise has some sort of internal structure for making decisions and directing the affairs of the enterprise. The court then examined the evidence in that case and concluded that that requirement was satisfied by evidence that there was a leader and a group of supervisors, with different roles and responsibilities. "The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement." 709 F.2d at 224 (footnote omitted).

In *United States* v. *Bledsoe,* 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982), the court explained the "enterprise" requirement in terms quite similar to those used in *Riccobene:* "Th[e] distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes."[2]

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[2] In *Bledsoe,* 674 F.2d at 666, the court overturned RICO convictions where "[a]t best, the Government has shown two separate associations of individuals without any overarching structure or common control." As already noted, just such an overarching structure is present in this case. Furthermore, in *United States* v. *Lemm,* 680 F.2d 1193 (1982), cert. denied, 459 U.S. 1110 (1983), the Eighth Circuit clarified the meaning of its opinion in *Bledsoe* in a way that made clear that the court was simply applying this Court's analysis in *Turkette.* The court in *Lemm* explained that an association of persons engaged in illegal activities can be an enterprise as long as the group has a common purpose, functions "as a continuous unit with more than sporadic contacts," 680 F.2d at 1200, and has a "structure distinct from that inherent in the conduct of a pattern of racketeering," *id.* at 1200-1201. Thus, the evidence need not include proof that the enterprise engaged in legitimate as well as illegitimate

Finally, in *United States* v. *Tillett,* 763 F.2d 628, 631 (1985), the Fourth Circuit found an enterprise in the "operational structure" of a drug trafficking enterprise, noting that the organization had specific functions for each member in the financing, importation, transportation, and distribution aspects of each venture, and that the smuggling techniques and details of the operation were virtually identical with each boatload.

Each of these three cases upon which petitioner relies holds that the enterprise element of RICO may be satisfied by proof similar to that present in this case. Petitioner claims, however, that two courts of appeals have found proof of an enterprise on a lesser showing. *United States* v. *Bagaric,* 706 F.2d 42, 55 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Weinstein,* 762 F.2d 1522 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986). In fact, however, any differences among the cases appear to be simply semantic ones. In *Bagaric,* 706 F.2d at 55-56, the Second Circuit remarked that "the nature of the misconduct often provides the best clue toward defining the enterprise," and that "it is logical to characterize any associative group in terms of what it *does* rather than by abstract analysis of its structure." In *Weinstein,* 762 F.2d at 1537 n.13, the Eleventh Circuit stressed that *Turkette* does not require an enterprise to have a distinct, formalized structure, since this Court had specifically stated that the entity could be formal or informal in nature.

It is thus true that the Second and Eleventh Circuits, as well as other courts of appeals, have rejected the need to

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activities; all that is needed is that the proof show that the association of the co-conspirators goes beyond the "sporadic contacts" and the " 'minimal association' necessary to perpetrate the acts of racketeering." *Lemm,* 680 F.2d at 1200 (quoting *Bledsoe,* 674 F.2d at 664).

show a distinct, formalized structure in order to adequately prove a RICO enterprise. See, *e.g.*, *United States* v. *Williams*, 809 F.2d 1072, 1093-1094 (5th Cir.), cert. denied, 108 S. Ct. 228 (1987); *United States* v. *Qaoud*, 777 F.2d 1105, 1111-1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Mazzei*, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983); *United States* v. *DeRosa*, 670 F.2d 889, 895-896 (9th Cir.), cert. denied, 459 U.S. 1014 (1982); *United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980). As noted above, however, the three cases cited by petitioner are not to the contrary. Although they require that the group have some kind of structure, those three decisions make clear that that requirement is satisfied even if the actual functioning of the group reveals nothing more than that the different actors in the enterprise perform specialized roles within an ongoing criminal association. Those courts have thus recognized, as the Court held in *Turkette*, that an enterprise may be informal in nature, and that it often will be when it is formed for the purpose of carrying out illegal activities. In sum, all the courts of appeals are applying *Turkette*'s directive to ensure that the government proves both the existence of an enterprise and a pattern of racketeering activity, while recognizing, as *Turkette* also pointed out, that the proof of these two elements may well "coalesce" in particular cases. 452 U.S. at 583. And the enterprise proved in this case, which had a clearly defined internal structure and a continuing existence over a several-year period of time, would have satisfied any of the formulations used to describe the enterprise element.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

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